IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHEILA ALLEN, individually and on behalf of all others similarly situated, Plaintiff, vs. JPMORGAN CHASE BANK, N.A., Defendant.	Docket No. 13 C 8285 Chicago, Illinois October 21, 2015 10:05 a.m.

TRANSCRIPT OF PROCEEDINGS - Hearing
BEFORE THE HONORABLE REBECCA R. PALLMEYER

APPEARANCES:

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THE CLERK: 13 C 8285, Allen versus JPMorgan Chase Bank for final approval hearing.

MR. KEOGH: Good morning, your Honor.

Keith Keogh on behalf of plaintiff and the class.

THE COURT: Good morning, Mr. Keogh.

MR. CAFFARELLI: Good morning, your Honor.

Alex Caffarelli on behalf of plaintiff and the class.

THE COURT: Good morning.

MS. STRICKLAND: Good morning, your Honor.

Julia Strickland of Stroock & Stroock & Lavan on behalf of Chase.

MR. RAO: And good morning, your Honor.

Arjun Rao also on behalf of Chase.

THE COURT: All right. We are here on plaintiff's motion for final approval of the class action settlement. I know there were objections, some of which have been withdrawn.

I want to ask for the record, are there any objectors or others related to this case, Allen versus Chase Bank -- JPMorgan Chase Bank, a class action, who would like to be heard?

MR. RHODES: Good morning, your Honor.

My name is Mark Rhodes. I am an objector to the class action settlement.

THE COURT: Are you an objector or counsel?

MR. RHODES: I am an objector. I also am a lawyer. I am barred in the Commonwealth of Pennsylvania as well as the state of New Jersey, but I am appearing as an objector -- as a member of the class today.

THE COURT: Okay. You are a class member.

MR. RHODES: Correct, your Honor.

THE COURT: All right. Why don't I ask you to remind me of the nature of your objections.

MR. RHODES: My objections basically come down to two main points. One is that I have objected to the class action fees because there has been no Lodestar cross-check performed by the Court.

THE COURT: Right.

MR. RHODES: Although plaintiff's counsel suggests that that's disfavored in this circuit, recent Seventh Circuit opinions advise that a cross-check is appropriate in certain cases. I would submit this is one of those cases.

The second main objection is to the inclusion of a $10 floor before a second distribution is made of the settlement proceeds.

My belief, as I stated in my objection, was that it would leave as much as a million dollars to go to an undisclosed *cy-près* recipient. But now, with the additional information provided by counsel in terms of the amount of

money available for distribution, I have a chart that I can hand up to your Honor and show that it's actually -- because of the increased amount of the distribution, that the amount is probably about three-quarters of a million dollars. It's around $700,000, if the 10 percent -- or the $10 floor is maintained.

So my objection is to that, in terms of the class settlement itself, and suggest that that should be lowered significantly before -- as a prohibited -- prohibition before a second distribution is made.

THE COURT: Why don't I ask Mr. Keogh or Mr. Caffarelli if you want to explain why the $10 figure was chosen as a threshold for additional distribution.

MR. KEOGH: Certainly, your Honor.

Take a step back. We would also object. Mr. Rhodes never filed his objection. He mailed in defense counsel. Apparently he had my wrong address. So we never took discovery on Mr. Rhodes like we did the other objectors. He is kind of coming out of left field here, which defeats the whole purpose of filing an objection properly.

But to the merits of his question here, the $10 floor was picked because, in order to write the checks and to process the checks, there is expenses involved. So when you get anything less than that, it makes it not feasible. It doesn't make sense to send a $3 check when it

costs $2 to process that by administration costs.

Also, class members are less likely to cash smaller checks. The smaller the check, the more uncashed checks we have.

Taking a further step back, the class -- everyone claims it is a *pro rata* claim. The only amount left over for a second distribution is uncashed checks. We are not going to have a million dollars or three-quarters of a million dollars left in uncashed checks. It's -- I haven't -- that's over 10 percent of the settlement. That would be beyond unusual, your Honor.

So we have people who forget to cash their checks. And out of that small group, if it's more than $10, it makes it economically feasible to then have the class administrator reissue checks, put stop payments on the prior checks, do the mailings, and then process everything. That's why it's $10. It's just an amount that makes it economically feasible to process it.

THE COURT: I have considered the submissions, both originally made back in, I guess it was, April and now. I am prepared to approve the settlement as well as Mr. Keogh's request for fees and his request for a modest but, I think, significant incentive payment for the named plaintiff.

Let me explain why. I have made some notes that I think are worth just reviewing.

It's a settlement for more than $10 million for the class. The figure was reached, as I understand it, after a day of negotiations with former Judge Andersen, known for his ability to coax deals, but apparently unsuccessful in this case, presumably because the parties negotiated at arm's length and aggressively.

However, they were able to reach an agreement sometime after that day-long session with Judge Andersen, and that's the agreement that was presented to me.

The agreement notably does not include any blessing on the part of defendant for plaintiff's fee requests. So there is no reason to believe that, at least from that perspective alone, plaintiff was willing to sell the class members' interest short in return for a very substantial recovery -- plaintiff's counsel was willing to do that.

Ditto the $25,000 proposed incentive award for Ms. Allen, who herself had a number of violations of this statute in her own case and makes her an appropriate class representative, also donated substantial time and attention to the matter.

But again, there was no agreement, as I understand it, on the part of the plaintiff -- plaintiff's counsel and defense counsel that that -- that defendants would not object or that they would otherwise bless that proposal.

The $10 million, when distributed to the class

members, results in a modest but a genuine recovery for class members who are overwhelmingly unable to proceed individually, not only because they suffered no actual damages but because the statutory damages are not worth recovering on an individual basis because there is no fee-shifting provision, as I understand it.

So unless the class members themselves have substantial actual damages, there would be no incentive for them to bring their own private action.

The agreement that was reached is thus, on its face, reasonable, and the Court did grant preliminary approval some months ago.

There have now been a number of objections asserted, including that of Mr. Rhodes, who did not file anything that I am aware of but has stated his objections here in court. Why Mr. Rhodes, who is an attorney, didn't submit those in writing, I am not sure, but it sounds as though --

MR. RHODES: Your Honor, I did. I did. I have a copy for your Honor. I mailed it to your Honor as well as counsel, as required by the --

THE COURT: By the notice?

MR. RHODES: -- by the notice. Yes, your Honor.

THE COURT: All right. I will withdraw that observation.

The fact is, however, that only a handful of class members did object. In light of the very large number of class members, many of whom, as I understand it, received notice -- I would make an observation here that the effort to notify them was comprehensive and effective -- it was -- less than 1 percent of the class members have any objection. There were some opt-outs as well. But even that's a comparatively small number in light of the overall size of this class.

Objector Jabrani had some complaints about the class proposal that I would like to address briefly.

He complains that text messages were not included separately as a basis for recovery, although it's not clear that Mr. Jabrani himself received any texts.

Objector Sberna believes that the 60-day time period for a filing of a claim is insufficient. He doesn't say why, and he himself had no trouble meeting the deadline.

He also says a better approach is for class members to recover based on the number of calls they received. But, number one, he doesn't say whether he himself received multiple calls. In any event, the Court's duty is not to insist on the best approach, which is what Objector Sberna appears to believe, but to determine whether the approach that was adopted by counsel was reasonable and offers relief to the class.

Sberna says, "Thus an exchange for a chance at maybe $50, the class members have lost an opportunity to collect for each and every phone call made by defendant, or text message on each and every phone line. The potential for each class member is possibly thousands of dollars under the TCPA." That's the end of the quote.

This Court doubts that any class member could realistically expect to recover thousands of dollars from Chase for the violation alleged.

But let's assume that they are. No class member lost the opportunity. They are all free to opt out, and some did. If any class member could collect thousands of dollars, I would encourage that person to opt out. They have lost nothing as a result of the settlement.

To the extent Sberna somehow believes that Chase would have agreed to a proposal in which each class member would collect a substantial amount of money for every message, he offers no evidence that Chase would have been agreeable to that kind of proposal. Given the hard-fought negotiations in this case, I suspect that would not have happened.

Sberna also says that a better approach would have been to calculate the violations for each class member and then attribute a value of $50 per violation then used as an offset against what's alledgedly owed to the defendant.

He says, making the adjustment to each and every class member's account assures that all class members receive the benefit. But to the contrary, I think what he is proposing would create a subclass of persons who owed Chase money. Not everybody in this case owed Chase money, or at least so it's alleged.

The plaintiff, I believe, Ms. Allen, believes she didn't owe Chase any money. So under Mr. Sberna's approach, Ms. Allen herself doesn't get the relief that he thinks she is entitled to.

For some debts maybe there are some class members who do owe Chase some money. But for some of those debts, the statute of limitations may have run. There is no reason to voluntarily pay Chase for money that they would not legally have been entitled to recover.

In any event, any class member who wishes to can do precisely what Mr. Sberna has proposed; that is, any class member who can take the $50 -- or actually it looks like it's going to be closer to $70 -- and use that money to pay this indebtedness or any other indebtedness or go to the casino, it's his choice. There is no reason to require this proposal that Mr. Sberna has proposed. And nothing about his proposal suggests it would have been a better resolution for the class.

Sberna also criticizes the *cy-près* award. I know

that Mr. Rhodes criticizes that award as well. But I think that criticism ignores what I think is a pretty careful effort to limit the *cy-près* recovery and maximize recovery to the class. There may be no substantial *cy-près* award.

And I would note that Mr. Keogh's explanation about the $10 threshold is precisely what I would have assumed. Writing checks, even for amounts as small as $10, can be prohibitive. I myself, were I to get a small check in the mail, might very well not think it's worth the bother of cashing it, with the result being that fewer people get relief under the proposal that I adopt some standard other than $10.

MR. KEOGH: Your Honor --

THE COURT: I do think Mr. Keogh is correct, that the smaller the check, the more likely that class members will leave them uncashed.

MR. RHODES: Your Honor, I agree with that sentiment exactly. That's why I am suggesting that to have a second distribution of a low sum is inappropriate.

THE COURT: But it won't be necessary in this case.

MR. RHODES: Your Honor, if I may? I prepared a chart. If I could hand this up to your Honor?

THE COURT: Sure. Of course.

(Document tendered.)

MR. RHODES: This shows, based upon the information

-- I have several for counsel, if they wish.

(Documents tendered.)

MR. RHODES: This chart was based upon the information provided by counsel in their final fee petition and the response to the objections.

I created this chart based on the total submitted claims of 84,727. The estimated dollar amount per claim is $70.25, showing total claim payments of almost $6 million.

I backwards-engineered this information to say, okay, let's say it's a $10 -- $10 is available for a second distribution. That means $741,000 is available to be distributed to the number of participating claimants who did not -- who did cash the check. That's the top line. That would mean 74,169 claimants cashed the check. 10,558 did not. So there would be a $10 distribution.

So the second-to-the-last column is the dollar value of forfeiture to *cy-près*. So at $10, there is no forfeiture.

The next line down, highlighted in yellow, if there is $9.99 left for distribution, $741,067 is forfeited to a *cy-près* award.

My suggestion, if everybody agrees that small checks are bad, let's lower the threshold for what the check should be, and let's take it all the way down to $2. If everybody is saying that it's unlikely there is going to a

cy-près award in this case, what is the problem of reducing it to a $2 floor? That way, if there is a *cy-près* forfeiture, it's only in the amount of $164,872. That's the second yellow line.

So if everybody is in agreement that there is no reason to -- that there is no concern that a *cy-près* award will be made, then what is the harm in reducing the floor to $2?

THE COURT: Well, the harm is precisely the one Mr. Keogh mentioned, that it's expensive to cut checks for very small amounts of money.

MR. RHODES: Your Honor, according to their submission, they have spent $800,000 so far in administrative fees to make -- provide notice to 2 million people. So there has been no testimony on two things.

One, what is the projected number of uncashed checks? No one -- none of the claims administrators -- there have been no affidavits, no declarations saying what the anticipated amount of checks not cashed would be at a $70 distribution.

I submit to you that most of the class members who get a $70 check are going to cash it.

So why not reduce --

THE COURT: I do as well. I think that's right.

MR. RHODES: Why not reduce the floor to $2 so that

if there is not enough money to make a distribution of $2 or more, then the money resorts to a *cy-près*? I still object to a *cy-près* whatsoever.

THE COURT: I thought we were talking about a second distribution.

MR. RHODES: We are, your Honor.

MR. KEOGH: This is one thing where, since he didn't file the objection, he wrote it in. It was required to be filed by the Court's order. So it should be overruled on that matter.

But there is nothing here saying qualifications of counsel experienced in class actions to set forth this chart and what the expected percentages are.

Now, if we took discovery, we could have asked him that. He is saying there is no administrator testimony. He is showing up at the last second with a chart.

This is why it's required to be filed, so we don't have this kind of nonsense of someone coming in and making up evidence.

MR. RHODES: Two points, your Honor.

JPMorgan Chase's counsel addressed my objection in their response to the objections. If plaintiff's counsel didn't choose to do that, that's their reason.

MR. KEOGH: He didn't mail it to me.

MR. RHODES: Second point, your Honor.

There is nothing here except math. This is just math.

THE COURT: Yes, it is. It's just math.

MR. RHODES: Yes.

THE COURT: It's just math.

One would have to set the line somewhere. I don't think it's -- the suggestion you are making is that things could have been different. Of course they could have.

MR. RHODES: Your Honor, all you have to do is change $10 to $2, and you kick into this settlement $600,000 -- or $545,000.

THE COURT: Much of which will never reach the class members because they won't cash those checks.

MR. RHODES: Why?

Your Honor, I am suggesting if you reduce the dollar amount to $2, then the distribution to the class members will go up. It will be higher than $70, because you don't have to hold back anything.

MR. KEOGH: There is nothing being held back. I think that's where he is misunderstanding.

THE COURT: I think so, too.

MR. KEOGH: It's all going out, and only the uncashed checks -- so it's not like we are budgeting and the proration is less because of this budget. It's all going out.

THE COURT: No amounts are being withheld. We are not withholding $10 per class member.

MR. RHODES: I understand, your Honor. I am not suggesting that. What would be withheld is, on the second distribution, it would be withheld.

On the second distribution, if there is $714,248 remaining, that money is not going out to the class. That's the third line down. That's at 958.

Or even better, if there is $741,067, that money is not going out. That's going to an undisclosed *cy-près* recipient, the one of which, as suggested by plaintiff's class action counsel, is objected to by the defense.

THE COURT: Here is my understanding.

All the money is being paid out. Some checks won't be cashed. That will leave money in the pot. It doesn't revert to the defendant. The defendant doesn't get the money back.

MR. RHODES: I understand that, your Honor.

THE COURT: So plaintiffs are proposing, we will pay all the class members again, as long as there is enough for each of them to get $10 or more.

MR. RHODES: I understand that, your Honor.

My point -- my objection is that that's too high.

Why $10? We don't have any testimony what the cost is to stop the payment on checks and mail new checks. Let's

say it's $2. If it's $2, then --

MR. KEOGH: Then they are actually getting zero.

MR. RHODES: Then pick the $3 -- pick one of the other lines here and say it's $3.

THE COURT: Mr. Rhodes, you are correct that any amount would be arbitrary. That by itself is not a basis for me to disapprove of this proposal, particularly where your objection was mailed to defendants but not even filed with the court.

I don't think it's appropriate for me to entertain this detailed objection about a matter that's really largely arbitrary at this stage.

So that objection is overruled.

MR. RHODES: Your Honor, is my chart going to be made a part of the record?

THE COURT: I will certainly make your chart part of the -- well, actually, I am not sure that I can. You will have to move for leave to do that, because you are just handing it up right now and never properly filing it with the court. So I will ask, if you do want it to be part of the record, that you do so.

I just want to make another couple of observations about some of the other objections that were made.

There is a suggestion that the Court should somehow -- I think Sberna made this suggestion as well or

maybe Burack -- that the Court should have -- should somehow wait until after the *Spokeo* case is decided. If anything, that case presents danger to the class. If it comes out the wrong way for the plaintiffs, a very substantial amount of money that would otherwise be available to them is going to slip right through their fingers.

I don't think that would be effective carrying out of fiduciary duties to the class members, to try to delay things here.

The FCC has ruled in a way that's agreeable to the plaintiff, but not even that determination is rock solid. I think it could very well be challenged.

Another observation is that many class members, it appears, may be among those who are subject to a defense of this claim as arbitrable. I'm not sure about whether Mr. Rhodes himself might fall into that category.

You are right, Mr. Keogh. There was no discovery.

There is also the possibility that some class members, including notably a couple of the objectors here, could be found to have consented to the calls at issue because they provided their phone number. That, too, would defeat recovery for a large swath of class members, including, as I mentioned, two of the very people who are now objecting to it.

I want to turn finally to the issue of fees.

This circuit is arguably unusual in leaning in favor of the contingency recovery for class counsel. But I think that resolution is logical under the approach that was explained pretty well by Professor Fitzpatrick in his submission.

He explains why the percentage of recovery is a better method of awarding fees than a Lodestar or a Lodestar multiple, because it really does create incentives on the part of plaintiff, not only to prevail but also to prevail at the highest level for the class possible, because that increases the counsel's own recovery.

Professor Henderson at the University of Chicago suggested that there is some -- by looking at some other cases, that plaintiff's counsel actually had a 64 percent chance of prevailing. I am not even sure that's true.

And plaintiff suggests that, if you read his affidavit correctly, it has the effect of rewarding poor performing lawyers.

But let's assume that Mr. Henderson's approach, which has been rejected, I believe, by Judge Holderman in another case, but he is still making the argument that plaintiff's counsel is entitled to market rate.

There is ample basis to conclude that a contingency recovery is what the market calls for, particularly in a case like this, where I believe Mr. Keogh and his colleagues were

operating on a pure contingency basis as opposed to any fees up front.

The recovery to the plaintiff's attorneys is actually a little bit less than 33 percent of the award, when you recognize that they had to advance the costs. There was a pure contingency. This is not a case where there was zero risk of recovery -- zero risk of nonrecovery.

It seems to me that counsel has -- counsel has satisfied me that the fee award they are asking for is reasonable under the circumstances; and for the reasons mentioned earlier, that Ms. Allen, too, is entitled to the $25,000 incentive fee for which she has moved.

I understand the defendants have not made an objection to those requests, although they are certainly not precluded from voicing one.

Is there any other issue that I have not addressed?

MS. STRICKLAND: Not from us, your Honor.

THE COURT: I believe you gave me a proposed final order, but if not, if you could, do that.

MR. KEOGH: We can e-mail it to your Honor, if you would like.

THE COURT: That would be great. All right.

MR. KEOGH: Thank you very much, your Honor.

MR. CAFFARELLI: Thank you, your Honor.

MR. RHODES: Thank you, your Honor.

(An adjournment was taken at 10:28 a.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Frances Ward November 23, 2015.
Official Court Reporter
F/j